U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: JUN 21 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, a public university, seeks to employ the beneficiary as a research assistant professor. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on September 20, 2010. In an accompanying statement, counsel stated that the beneficiary "has been involved in highly important research on the mechanisms of malignant and nonmalignant pancreatic pain in patients. . . . She performs highly specialized *islet cell transplantation research and procedures* that are life saving for the patient for the patient with intractable pain of chronic pancreatitis" (emphasis in original). Counsel asserted that the beneficiary's "research has resulted in important implications in the fields of Neuroscience, pain research, as well as pharmaceutical research and development."

The beneficiary herself stated: "I am currently leading the very challenging studies of elucidating the mechanisms that drive pain induced by chronic pancreatitis (CP) and in patients suffering from pancreatic cancer. This work will be a first of its kind and the clinical implications are tremendous."

To support counsel's claim that the beneficiary "is considered one of the leading experts in the field of Medical Pharmacology," the petitioner submitted several witness letters, mostly from faculty members at the petitioning university. The letters all predate the filing of the petition by several months or years, having been prepared in support of earlier, denied immigrant petitions. (Likewise, many exhibits date from April 2010 or earlier.)

Regents [redacted] stated:

> [The beneficiary conducted her doctoral studies in] the laboratory of . . . [redacted] This laboratory performs basic research on mechanisms underlying pain across a variety of models. . . . [The beneficiary's] research was primarily concentrated on mechanisms of pancreatitis-induced pain and the role of proinflammatory mediators in such pain. . . . During her graduate career she provided input as to research direction, experimental design, and became expert in surgical and behavioral testing skills required to finish the project. These are important methods for testing the validity of new drugs for the treatment of pain in humans. . . .
>
> [The beneficiary] received her PhD in Medical Pharmacology in 2007. One of the major findings of her studies is the role of inflammatory cytokine IL-6 in generation and maintenance of pain in chronic pancreatitis. In particular, [the beneficiary] has demonstrated that by antagonizing IL-6 in a model of chronic pancreatitis one can achieve a degree of pain relief that is comparable in efficacy to opioids, the only pain medications that are currently available for patients with intractable pain of chronic pancreatitis. This study is a major breakthrough in the field of pancreatitis pain that will have a tremendous impact on the entire field of pain research. . . . [The beneficiary] is currently a postdoctoral fellow in the laboratory of [redacted] Her research effort there is focused on the mechanisms of malignant and non-malignant pancreatic pain in humans. . . . She is performing a highly specialized islet cell transplantation procedure that is considered a life-saving procedure in patients with intractable pain of chronic pancreatitis. There are only two centers in the entire United States capable of performing this unique procedure, and [the beneficiary] is one of only a handful of scientists capable of performing it.

[redacted] called the beneficiary "an innovative scientist" with "technical expertise in assessing pain across a variety of experimental models," and who "became expert in surgical and behavioral testing skills required to finish projects."

[redacted] stated that the beneficiary is "intimately involved in isolating islet cells to treat diabetes and pancreatitis. [The beneficiary] possesses a unique combination of skills that makes her absolutely irreplaceable and vital for the Center of Cellular Transplantation."

[redacted] at the petitioning university, stated that the beneficiary's "unique combination of research skills and training, as well as her medical background, make her a unique and highly valued medical researcher."

[redacted] stated that the beneficiary "is one of a small number of surgeons in the United States that has successfully accomplished the autologous transplantation to treat patients with chronic pancreatitis and relieve their pain and maintain normal insulin levels."

[redacted] associate professor at the petitioning university, stated that the beneficiary "has pioneered the mechanisms of pancreatitis pain, demonstrating a significant role in the activation of cytokines such as IL-6 that promote pain of the pancreas." He added: "There are important aspects of our research that absolutely require her technical abilities for their completion including difficult surgeries . . . and behavioral measurements that are recorded for weeks to months."

The remaining four initial witnesses work for various other employers. [redacted] supervised the beneficiary's residency training [redacted] praised the beneficiary's work in positive but general terms, and deemed her to be "an innovative and capable scientist who can and will make very significant contributions to the health and well being of Americans."

[redacted], retired senior director of [redacted] stated that he has "known [the beneficiary] since 1995," when the beneficiary was 18 years old, but did not specify how. [redacted] provided a rough outline of the beneficiary's academic progress and stated that her "knowledge, experience, [and] scientific abilities in the field of medical pharmacology could be beneficial to the USA."

[redacted] a medical project manager at [redacted] stated:

> I am not a mentor or colleague of [the beneficiary], but for the last several years I had met with her at scientific meetings to discuss one of the most important topics in modern neurobiology and neurochemistry, namely chronic pancreatitis-induced pain. . . . She demonstrated the chronic pancreatitis-induced pain is driven by activation of TRPV1 receptors and increases in peripheral interleukin-6 (IL-6) levels. . . . [The beneficiary] has elucidated at least two potential novel opportunities (antagonism of TRPV1 receptors and inhibitors of IL-6) for the treatment of several types of chronic pain, both of which are of great interest to the pharmaceutical industry.

[redacted] senior research investigator at [redacted] stated: "I am not a mentor or colleague of [the beneficiary], but for the last several years I had met with her to discuss

one of the most important topics in modern neurobiology and neurochemistry, namely chronic pain." The AAO notes that a very similar passage appeared in [redacted] letter, which suggests common authorship or use of a shared template.

Regarding the beneficiary's work, [redacted] stated:

> [The beneficiary] has demonstrated that proinflammatory cytokines that sustain inflammation in chronic pancreatitis are also responsible for generation and maintenance of pain in this devastating condition. This revolutionary finding lead [*sic*] to the development of a completely novel class of analgesic drugs, namely, orally available [redacted] for the treatment of several chronic pain conditions, including neuropathic pain and migraine, which are major health care problems for millions of Americans.

The petitioner submitted copies of four journal articles and several conference presentations that the beneficiary co-wrote. The petitioner also submitted copies of two articles containing citations of the beneficiary's work. One of these citations is a self-citation by the beneficiary's co-author, [redacted] leaving one independent citation of the petitioner's published work. The submitted evidence, therefore, did not show that other researchers shared the witnesses' opinion of the beneficiary's work as "pioneering" or "revolutionary."

On November 9, 2010, the director issued a request for evidence. The director instructed the petitioner to "submit documentary evidence to establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director also specifically asked for copies or documentation of independent citation (as opposed to self-citation by the beneficiary or her collaborators) of the beneficiary's work.

The petitioner's response included copies of eight citing articles. Counsel stated:

> [A]lthough numbers of citations (so called the h-factor) can serve as an indicator of scientific proflicacy [*sic*], . . . the h-factor may provide misleading information about a scientist's accomplishments. Most important, the fact that the h-factor is bound by the total number of publications means that scientists with a short career are at an inherent disadvantage, regardless of the importance of their discoveries and accomplishments. For example, had Albert Einstein died in early 1906, his h-index would have ended at 4 or 5 . . . despite his being widely acknowledged as the most importance [*sic*] physicists [*sic*] in our time.

The h-index is not simply the total number of a researcher's citations. Rather, it is the result of a mathematical formula.[1] A researcher who has four papers cited at least four times each would have

[1] The proposal for the h index first appeared in [redacted] "An index to quantify an individual's scientific research output," *Proc Natl Acad Sci USA*, 2005 November 15; 102(46): 16569–16572. The article is available online at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1283832/ (excerpt added to record June 6, 2012).

an h-index of 4; one with at least ten papers with ten or more citations each would have an h-index of 10, and so on. It is, therefore, true that no researcher can have an h-index higher than his or her total number of articles. Nevertheless, the director did not ask for information about the beneficiary's h-index. The director asked about the total number of citations. Because the director did not request information about the beneficiary's h-index, counsel's assertions about Albert Einstein (copied almost verbatim from Wikipedia[2]) are irrelevant.

Three of the eight documented citations are self-citations by the beneficiary's collaborators, including prior witnesses [redacted] leaving five documented independent citations of the beneficiary's work. Only three of those five citations are marked as having appeared in articles published before the petition's September 20, 2010 filing date. Therefore, the petitioner did not establish a significant pattern of citation of the beneficiary's work before the filing date.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Counsel observed that one of the citing articles "is a commentary [on the beneficiary's article]. Pain recognized the importance of this study and invited esteemed experts to contribute a commentary. The fact that Pain considered the work significant is supported by the fact that the journal chose to publish a commentary about the research." The AAO notes that [redacted] the beneficiary's doctoral supervisor and co-author of her article, identified himself as a senior editor of *Pain*.

Furthermore, the petitioner has not shown that the beneficiary's article or the commentary (which both appeared in the same issue of *Pain*) were published before the September 2010 filing date. Counsel claimed that the article and commentary appeared in the May 22, 2010 issue of *Pain*, but the copy of the commentary in the record is an unpublished, unpaginated, undated proof copy, with incomplete bibliographic information provided as "xxx (2010) xxx-xxx." Counsel appears to have derived the May 22 date from a fine-print legend at the bottom of the first page, reading "DOI of original article: 10.1016/j.pain.2010.05.022." The numbers "2010.05.022," however, do not refer to the date "May 22, 2010." Rather, the legend is plainly marked as a DOI, or digital object identifier, which in this instance coincidentally resembles a calendar date. The proof also shows the DOI for the commentary, which is 10.1016/j.pain.2010.06.033. "2010.06.033" cannot correspond directly to a calendar date because June does not have 33 days. Thus, there is no evidence in the record to show that the beneficiary's article or the commentary were published on May 22, 2010, as claimed, or at any point before September 20, 2010.

Counsel asserted that the beneficiary's job requires "the combination of both a Medical Doctor degree and a Ph.D. in Medical Pharmacology [which] are a rare combination of credentials."

[2] From Wikipedia's "H-index" article, as it existed in December 2010: [redacted] died in early 1906, his *h*-index would be stuck at 4 or 5." Available [redacted]

Counsel contended that the Department of Labor would not grant a labor certification calling for that combination. Counsel cited no statute, regulation, case law, or evidence to support this claim. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted four additional witness letters. Two of the witnesses are researchers at the petitioning university. [redacted] a research associate who has shared author credit with the beneficiary, called the beneficiary "an integral part of the pancreatitis center" and stated that she "has come up with [an] absolutely innovative method to measure pain through the use of algometer," which "can offer insight into understanding other debilitating diseases and to compare the effectiveness of different treatments. There are important aspects of pancreatitis research that absolutely require her technical abilities and knowledge for their completion."

[redacted] assistant professor and director of the petitioner's Pediatric Liver and Intestinal Transplant Program, stated that the petitioner "has discovered a crucial role of interleukin-6 in the maintenance of pancreatitis-induced pain, and in collaboration with [redacted] a novel small molecule compound for treatment of such pain." [redacted] stated that the petitioner "is a [*sic*] integral personnel in the tremendously demanding task of successful islet isolation from the pancreas." [redacted] also stated: "The extraordinary combination of clinical and basic science expertise has qualified her to be invited as a reviewer for a [*sic*] several major peer reviewed journals . . . an opportunity that not every scientist has an [*sic*] honor of having."

The record does not support the claim that participation in peer review is a rare honor rather than a duty expected of scientists who submit their own work for peer review. Furthermore, while the petitioner has submitted copies of several reviews she has prepared, every one of them includes the heading "Reviewed on behalf of [redacted] which suggests that [redacted] received the invitations to perform peer review, and delegated the task to the beneficiary.

[redacted] 'prolific career demonstrates many features of an outstanding researcher," including "ground-breaking contributions" and "unparalleled findings."

[redacted] praised the petitioner's *Pain* article, stating: "The unique findings in this study have never been described before." [redacted] is one of several witnesses to praise two book chapters that the beneficiary co-wrote, but which remained unpublished when the petitioner responded to the request for evidence in December 2010.

A number of witnesses have asserted that the beneficiary's achievements and/or skills place her in the top three percent in her field. Even witnesses said to be independent of one another (such as [redacted] used this same "3%" figure, which, like the shared language discussed earlier, indicates that the witnesses did not write their letters entirely independently.

The director denied the petition on January 27, 2011, stating that the petitioner had not established the influence of the beneficiary's work. The director observed, for instance, that the petitioner had not shown significant citation of the beneficiary's work, or that procedures developed by the beneficiary are in widespread use. The director also asserted that "it is next to impossible" to assess the impact of book chapters before their publication.

On appeal, counsel states that the director improperly required the petitioner to "establish that [the beneficiary] had the ability to serve the national interest to a substantially greater degree than the majority of her peers." Counsel asserts: "This is completely wrong and . . . would be an impossible standard to prove. How would one identify her peers and weigh her ability against the others?" Many of the petitioner's witnesses, including some of its own faculty members, claim to have performed just such a comparison, placing the beneficiary in the "top 3%" of her field, specialty, "young scientists" or some other grouping. Therefore, it does not serve the petitioner well to assert, on appeal, that no such comparison is possible. (Elsewhere on appeal, counsel repeats the "3%" figure, without explaining how so many witnesses managed to derive exactly that figure if it is not possible to "weigh [the beneficiary's] ability against the others.")

The language that counsel contests comes from *NYSDOT*, a binding precedent decision:

> The alien . . . must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole.

Id. at 219 n.6. Counsel cites no court decision or other authority to show that the precedent decision is "completely wrong." Counsel likewise treats another *NYSDOT* passage as though it were a new requirement invented *ad hoc* by the director for the denial: "The USCIS officer has set out a requirement 'that an alien seeking an exemption from the labor certification process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.'" The passage quoted by counsel is taken essentially verbatim from page 218 of the precedent decision; it is not an arbitrary new requirement that "[t]he USCIS officer has set out."

Counsel asserts that the director "completely disregarded [the beneficiary's] exceptional ability as it relates to the labor certification process." By statute, aliens of exceptional ability are, by default, subject to the labor certification process.

With respect to the minimal citation of the beneficiary's work, counsel states: "How much clearer can we make this application? If this type of research is being conducted at only three sites in the world, what can we expect regarding research papers that relate to this work?" The AAO notes that the previously submitted letter attributed to [redacted] indicated that the beneficiary's "work is frequently cited by worldwide research groups from France . . . , Great Britain . . . , United States . . . , Austria . . . just to name a few." Only after the director observed the lack of evidence

that the petitioner's "work is frequently cited" has counsel claimed that the citation rate is low simply because almost no one else is performing research of this kind. The record, in any case, lacks documentary evidence to support the "three sites in the world" claim.

Counsel maintains: "There is no question based on the evidence that [the beneficiary] is substantially better than her peers." The AAO is not bound to accept this conclusion simply because counsel declares it to be obvious. The objective documentation in the record shows a handful of published papers with a handful of citations, as well as peer reviews conducted on behalf of a full professor at the petitioning institution. The only indication that the beneficiary stands above her peers comes from witness letters that, for reasons already explained, are problematic.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Several witnesses have attempted to make claims of fact that the record does not support.

Counsel claims, without evidence, that the petitioner would be unable to obtain a labor certification on the beneficiary's behalf. Section 203(b)(2)(B)(i) of the Act does not predicate the waiver of the job offer requirement on the inability to obtain labor certification, but rather on the national interest. Counsel also claims, without evidence, that the labor certification process would inevitably result in the termination of the beneficiary's employment. Also, counsel appears erroneously to equate the terms "minimally qualified" and "unqualified," stating paradoxically that a worker with the minimum qualifications for the beneficiary's position would not be qualified for the position.

In all, the record establishes that the beneficiary is a qualified and productive researcher who plays a valuable role in the laboratory where she currently works, but the record fails to provide credible support for witnesses' claims. The record shows that the beneficiary pursues research in an

important field, and the impact and influence of her work may become apparent with the passage of time, but the present petition appears to be premature.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.